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Supreme Court, U.S.
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IN THE
Supreme Court of The United States

OCTOBER TERM, 1992

JUAN LUIS BOSCIO,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether specific inducement is to be alleged in the indictment and if a showing is required that the Public Official induced the payor's consent by some affirmative act such as demand or solicitation, and if the indictment can be amended by the evidence at Trial, (over defendants objection) to bring evidence of demand and solicitation which was absent from the allegations in the indictment and out of the time-frame given in the indictment.

II

Can a conviction stand where Brady Materials have been intentionally withheld by the government, which did not permit complete full cross-examination of main witness, which in turn permitted perjured testimony and a false theory to stand uncorrected?

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IN THE

Supreme Court of the United States

October Term, 1992

JUAN LUIS BOSCIO

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION

TO THE HONORABLE COURT:

NOW Comes Petitioner Pro-se and respectfully prays, from this Honorable Court to issue a Writ of Certiorari to review the Judgment entered on January 21, 1992 by the Court of Appeals for the First Circuit Affirming Petitioner's conviction and the Order of March 19, 1992 denying petition for rehearing and denying suggestion for rehearing en banc.

I. OPINION BELOW

a) Judgment affirming conviction of the United States District Court for the District of Puerto Rico by the United States Court of Appeals for the First Circuit Cases No. 89-1253, 89-2022, Judgment rendered on January 21, 1992. APPENDIX I, P. 3a.

b) Order of the United States Court of Appeals for the First Circuit denying Rehearing and the suggestion for Rehearing en Banc entered on March 19, 1992. APPENDIX III, P. 35a.

c) Order of the Supreme Court of The United States extending the time for filing a Petition for Writ of Certiorari to and including July 17, 1992. APPENDIX XI, P. 66a

II. JURISDICTION

The Judgment of the Court of Appeals was entered on January 21, 1992. A Petition for Rehearing was denied on March 19, 1992.

This Honorable Court has Jurisdiction to review by Writ of Certiorari under the provisions of 28 U.S.C. 1254(1) and Rule 10 of the Rules of the Supreme Court if the Petition is filed with the Clerk of the Supreme Court within 90 days of the denial of the rehearing as established in Supreme Court Rule 13(1 and 4).

III. PERTINENT LAWS AND CONSTITUTIONAL PROVISIONS INVOKED IN THIS CASE.

Fifth Amendment of the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to twice put in jeopardy of life or limb; nor shall compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, without due process of law; nor shall be private property be taken in public use, without just compensation."

18 U.S.C. Section 1951(2) Hobbs Act. Interference with commerce by threats or violence:

(a) Whoever in any way or degree obstructs, delay or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section-

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State Through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. Section 3500 (Jenks Act.)

(This provision is very lengthy and we have included the same as Appendix IX at P. 60a, in accordance with Rule 1K.)

IV STATEMENT OF THE CASE

This is a highly publicized case which has become a political issue on two separate elections. The case has allegedly been for violation of Section 1951 and (2) of Title 18 U.S.C., where the indictment charges Petitioner with Three counts of said violation, which charges that Jose Tormos-Vega, Juan Luis Boscio and Miguel A. Serrano, together with Irding Chardon the Tormos and others to the Grand Jury known and unknown, with extortion and conspiracy to commit extortion.

This case is about the former Mayor of the Municipality of Ponce, Jose Tormos-Vega and Juan Luis Boscio, a former member of the Municipal Assembly, who allegedly committed extortion and Miguel Serrano, former Vice President of Shearson American Express of Puerto Rico.

It is alleged that in order to accomplish their goal, each one received $110,000 for authorizing a series of transactions between the Ponce Municipal Development Authority, Miguel Serrano doing business as Ponce Developers Inc., Home Federal Savings and Shearson American Express of Puerto Rico.

Miguel A. Serrano was also indicted on One Count of the conspiracy and his case was dismissed Pre-Trial by Judge Carmen C. Vargas de Cerezo, on the grounds that his immunized testimony given at Televised Public Hearings conducted by the House of Representatives of the Commonwealth of Puerto Rico, was improperly utilized by the Government to seek the indictment in violation of the Doctrine established in *Murphy v. Waterfront Commission of New York Harbo*r, 378 U.S. 52 (1964); and *Kastigar v United States,* 406 U.S.441 (1972).

This prosecution is One of Three Cases investigated by

Two consecutive Grand Juries. The First Case was directed against Serrano alone, United States v. Miguel Serrano, U.S. District Court of Puerto Rico, Criminal Number 84-381 to which Serrano plead guilty in Three Counts involving a series of fraudulent transactions with Home Federal Savings and Loan Association of Puerto Rico.

The Second Indictment, which was produced by the grand jury investigation, was against Juan Luis Boscio, William Stamps and Miguel Serrano, where Petitioner was convicted for One Count for aiding and abetting as charged and affirmed by the First Circuit Court in Case No. 85-1913.

The transaction that provoked the indictment in Case 85-1913 and for which Boscio was convicted for aiding and abetting in a wire-fraud (18 U.S.C. 1343) was one of the series of transactions which was brought to trial for a second time in the case at bar.

The Third Indictment (the case at bar) charge Jose Tormos-Vega, Juan Luis Boscio and Miguel Serrano with a conspiracy to obstruct commerce by extortion in Count One. Count Two, charge Tormos-Vega and Boscio with extorting money from Serrano and Count Three, also charges Juan Luis Boscio with a second act of Extortion.

The Grand Jury investigation was conducted in the shadow of an intensely partisan widely publicized debate at the same time that Televised Public Hearings were conducted by the House of Representatives of the Commonwealth of Puerto Rico and where Miguel Serrano, testified under absolute criminal and civil immunity for which the indictment was dismissed as aforementioned, since his immunized testimony was utilized by the government to procure the indictment.

The Indictment (APPENDIX IV, P. 37a) incorporates the

general allegations to the Three distinct Counts and no other allegations or overt acts from Count One are incorporated to subsequent Counts Two and Three.

The indictment expresses that the conspiracy took place "from about June 6, 1983, up to on or about August 29, 1983" in the District Court of Puerto Rico",and within "the Jurisdiction of this Court."

The indictment further states at averment Number Three(3) Count One: "That Jose Tormos-Vega and Juan Luis Boscio, would obtain and did obtain One One Hundred and Ten Thousand Dollars for a total of Two Hundred and Twenty Thousand Dollars, which was induced by extortion under color of official right"; but, it does not say **when** and **how** the inducement or demand took place, within the timeframe given at the indictment, (Which is June 6,1983 to August 29, 1983. The indictment is silent to any demand made by any of the co-defendants.

The Trial of this Case began on May 26, 1988 and a verdict was returned on June 15, 1988.

At the time Petitioner is alleged to have commited extortion, he was doing other transactions with Miguel Serrano, for which Serrano paid him for his independent role as a practicing Attorney, as stated Mr. Serrano, when cross-examined by Mr. Toro, Petitioner's attorney; Mr. Serrano said that Mr. Boscio had worked for his money. APPENDIX VII Pages 46a-55a. (Trial Transcript for June 10, 1988 Crim. Case Number 85-449(CC) Pages 10 to 16).

When Mr. Serrano was confronted with his immunized testimony before the House of Representatives where he said:

"Answer: "Well I am going to answer to that question . . .

Two parts, if I am allowed. In the case of Attorney Juan Luis Boscio, I PAID him the money because I understood that he DESERVED it, because he worked hard with me. I go back to what I said before, give to Cesar what is rightfully Cesar's. Really the man worked very hard and even left his law practice and attended to deal with me about details and when I had to go to New York, he always went with me - He helped me a lot".

I said that yes. I did. I did."

At Page 12 Trial Transcript (APPENDIX VII, P. 46a-55a.) Mr. Toro asked him:

The truth of the matter is, Mr. Serrano, that Mr. Boscio worked hard for his money, didn't he?

A - "That is correct."

Then, the Prosecutor at recross, confronted Serrano with what he had testified and he reaffirmed himself as to that as follows: (APPENDIX VIII P. 46a.) (Trial Transcript at Pages 12 to 13.)

Q - When you testified then in the House of Representatives regarding the $660,000, how does that testimony compare you have given here?

"Its identical. I haven't even refuted what Mr. Toro Cuberge said here. I said I reaffirmed myself in what he was reading."

At the following page 13 (T.T.) APPENDIX VIII P. 46a, the Prosecutor wanted to establish that the Universal Tank Transaction (the transactions between Mr. Serrano and Boscio) was unrelated to his payment as follows:

Q - And the Universal Tank Transaction does not have anything to do with the $660,000 commission?

A - "In total scope yes."

A - "When you look at the WHOLE PICTURE."

Miguel Serrano was not announced as a witness, he was brought to trial in an attempt to establish demand and inducement. The government was conscious of the fact that Petitioner had been paid for his work as a Lawyer in Private Practice. (Petitioner reported the income derived from the payment received from Serrano in his Income Tax Returns for the year 1983.) The witnesses presented by the Prosecutor were prepared so, that Petitioner would be divorced from the Universal Tank transaction, from where Petitioner had collected his fee.

Witnesses did not remember crucial facts or either denied those facts purposely, so as to prevent any evidence that could exculpate Petitioner to be transmitted to the Jury and the government did not reveal evidence which was exculpatory and witnesses 302's were withheld, which could have been utilized in proper cross-examination and which would have permitted Petitioner to rebut and prove that other witnesses were giving false testimony.

The most crucial testimonies in the case against Petitioner Boscio, were Rosario Camacho, the Home Federal Savings, Branch Manager and Miguel Serrano, Vice-President at Shearson American Express.

Mrs. Camacho was very elusive when she was interrogated and denied any connection between Petitioner and the loan of $14,000,000 granted by the Bank. (Boscio has always contended that he was paid for the work he had done in connection with said loan as a private practicing attorney.)

The Prosecutor presented in evidence One page of Ponce Developers Account (Mr. Serrano's account at Home Federal Savings) and Petitioner's attorney objected to it because it was an incomplete statement and the prosecutor said that it was the only page he had and the judge overruled and the government was allowed to introduce into evidence the isolated page which excluded the remainder of the statements, which as we discovered after Trial showed the Deposits pertaining to the Universal Tank transaction which could have been utilized to properly cross-examine said witnesses.

In the Direct Examination by the prosecutor Mr. Serrano testified, that he had "earmarked" in June,(1983) a $100,000 Certificate of Deposit for future payment to Mr. Boscio. (The C.D. to which Mrs. Rosario Camacho, had testified as having being withdrawn from the $660,000 payment, that Mr. Serrano had taken from the Municipality.) Boscio objected to the testimony since the certificate of deposit was not introduced in evidence. The trial Judge overrruled.

The Certificate of Deposit, **was never introduced in evidence** and the Prosecutor introduced into evidence a chart, Appendix VI Page 45a, which shows that Petitioner collected his fee from the money Serrano had collected from the Certificate of Deposit, that is The Municipality thus establishing to the Jury that Mr. Boscio was paid from the Municipal funds, (Trial Exhibit 36.)

Furthermore, Mr. Serrano, over Defendant's joint objections on the grounds of variance, testified and the Court permitted it, that Mr. Boscio had approached him in **April or May, 1983** and asked Mr. Serrano, what was in it for him, as to prove demand, that which was not alleged in the Indictment, nor is it within the Indictment's **time frame**, which is **June 6, to August 29, 1983**. Again, and over the Defendants joined objection, on the grounds of **variance**, Miguel Serrano

testified that on **September, 1984**, (more than a year after the last date given in the indictment) Mr. Tormos, himself and Mr. Boscio had met to cover-up the payment made to Mr. Tormos at Florida, which is **another Jurisdiction**, because the indictment appraised that all acts alleged were committed **within the Jurisdiction of the U.S. District Court for the district of Puerto Rico**.

Petitioner Boscio, was convicted on June 15, 1988.

On December 2, 1988,(almost six months.after Trial) Mrs. Beatriz de la Torre, a Journalist from the **San Juan Star**, was having dinner at a local restaurant in Ponce, Puerto Rico, with Mr. and Mrs. Boscio. After dinner, she had to phone the Newspaper Offices and Mrs. Boscio accompanied her to the public telephone, which is located outside the Dinning Room and there Mrs. Boscio was approached by Mrs. Rosario Camacho, who greeted her and they conversed in front of Mrs. de la Torre; during the conversation, Mrs. Camacho admitted that she had given perjured testimony at Trial and that during the month of August, 1988,(two months after Trial) she had given **new testimony** at a Deposition in the related Civil Case, where she had corrected some of her trial testimony.

Once Mrs. Boscio gained knowledge of the existence of said Deposition, and new testimony, she contacted one of the Attorneys for Shearson American Express; Fiddler, Gonzalez & Rodriguez and they provided a copy of said Deposition.

Upon examining the Deposition, with accompanied exhibits, we made several important discoveries.

First: That the Federal Savings and Loan Insurance Corp. had been provided the Civil Case against Shearson, **the grand jury minutes**, which Mrs. Camacho had at the Deposition.

Second: That at the Deposition, Mrs. Camacho had copies of several 302's of interviews by the F.B.I. (Dated May, 4; May 21; June 11; October 5; and November 6, 1984) None of those 302's, that were made available to FSLC for Civil litigation were not provided to Petitioner Boscio.

Third: When Rosario Camacho was confronted with the same check to Mr. Boscio for $50,000 that she had denied at Trial as being Mr. Boscio's legal fee for the Universal Tank closing she admitted at the deposition that it was Mr. Boscio's legal fees.

Fourth: Through the Deposition and its accompanying documents we found among other, **the $100,000 Certificate of Deposit**. See **Appendix V** Page 44a. The Certificate of Deposit was mentioned and objected as hearsay, because the document was not presented into evidence. Witness Serrano, testified at Trial that this Deposit had been "earmarked" for payment for Mr. Boscio.

But as the new evidence shows the C.D. din not mature until **September 15, 1983**, so that the payment to Mr. Boscio was not from the Municipality, because it came from Mr. Serrano Accounts as alleged in the indictment on August 25 and 29, 1983, from other funds deposited on August 1, 1983, the day of the closing of the Universal Tank Loan from the proceeds of said loan for which Boscio was paid.

The government presented the Chart, (Trial Exhibit 36) and stated: "that the purpose would be to show that everything that appears there is reflected in the evidence in the case already." Defendants stipulated to the Exhibits but stated: "We are naturally not accepting that this is true. What we are accepting is that— that —is the theory of the government. See: Trial Transcript June 10, 1988, Page 36. (**Appendix X, Page 62A, June 10,1988 Redirect examination of Miguel Serrano.**)

If the government would have presented the Certificate of Deposit, which **would have been exculpatory**, it would have impeached Serrano's testimony and would have rebutted the Government's theory and summary. See: **Appendix VI**, Page 45a, (Chart as presented in Evidence by the government showing source and distribution of money received by Boscio.) But, instead, the Government, to obtain a conviction, chose not to present the Certificate of Deposit and let Serrano's testimony stand uncorrected.

A Post-trial Motion to Dismiss was filed, and a Motion for a New Trial for Newly discovered evidence; both of which were denied without a Hearing and Petitioner was sentenced on February 10, 1989 to Twelve Years imprisonment in each of Three Counts to run concurrently with each other and fined $5,000 as to each Count.

V. ARGUMENT

POINT I

Whether specific inducement is to be alleged in the indictment and if a showing is required that the Public Official induced the payor's consent by some affirmative act such as demand or solicitation; and if the Indictment can be amended by the evidence at Trial; (over defendants objection) to bring evidence of demand and solicitation which was absent from the allegations in the indictment and out of the time-frame given in the indictment.

As we have stated in our averment of fact, the government, through Miguel Serrano's testimony brought several significant variances, which amended the indictment, nor did occurred in the time frame given at the indictment.

It is a basic principle that in order to guarantee protection of a criminal defendant's rights, an indictment must contain the elements of the offense intended to be charged and sufficiently appraise the defendant of what he must be prepared to meet at trial. *Russel v. United States*, 396 U.S. 749, 763, 82 S.ct. 1038, 1046, 8 Led 2d 240.; and the Fifth Amendment assures the defendant that the government will try him on the charges the grand jury voted, not on some other charges that are not made in the indictment against him. *Stirone v. United States*, 361 W.S. at 217, 85 S.Ct. at 273; See also: *Samburq v. United States*, 418 U.S. 87, 177 S.Ct. 2887, 41 Led 2d 50 (1974).

The indictment in this case did not establish specific acts in which either Tormos or Boscio asked or demanded payment to act, or not to act. The indictment alleges that both of them were acting as officials of the Municipality and merely parroted the statute, by simply stating:

"On or about June 7, 1983, in the District of Puerto Rico, and within the Jurisdiction of this court the defendants, Jose Tormos Vega and Juan Luis Boscio the defendants herein, aiding and abetting each other, did unlawfully, knowingly and willfully commit extortion, as the term is defined in Section 1951(b) (2) of Title 18, United States Code, that is defendants herein did obtain one hundred and twenty thousand dollars from Miguel A. Serrano, in his capacity as Vice President of Shearson American Express with the consent of Miguel Serrano, such consent having been wrongfully obtained **under color of official right**, as the term is used in Section 1951 and (2) of Title 18 United States Code, and said extortion did have an effect in commerce, as the term is defined in Section 1951(b)(3) of Title 1.8 United States Code, Section 1951 and 1." See: **Appendix IV** Pages 3a-33a.

The indictment missed to state where, when and how the demand for payment was made.

The government had in its mind when presenting the case and the indictment to the grand jury that they had to allege and prove only **that the defendants received a payment while acting under official** Capacity and that was enough to sustain a conviction

There is discrepancy in the several circuits as to the need to allege and prove some affirmative act of inducement.

The First Circuit goes along with the Circuits which established that the color of official right element required no more than proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions.

Following this reasoning are *United States v. Spitler*, 800 F2d 1267, 1274 CA 4 (1986); *United States v. Paschall*, 772 F2d 71 (CA 4 1985).

The Second Circuit in *United States v. O'Grady*, 742 F2d 682 (1984) and the Nine Circuit in: *United States v. Aguon*, 851 F2d 1158 (1988) have followed a different rule since they held that some affirmative act of inducement by the official had to be shown to prove the government's case. (The First Circuit has not passed on the **O'Grady-Aguon**, analysis. See: Courts Opinion at Page 18, **Appendix I** Pages 3a-33a.

The Supreme Court recently stated in *McCormick v. United States*, 59 U.S.L.W. P.4474 as follows:

"Until the early 1970's, extortion prosecutions under the Hobbs Act rested on allegations that the consent of the transferor of property had been "induced by wrongful use of actual or threatened force, violence, or fear-"; public official right" phrase standing alone. Beginning with the conviction

involved in *United States v. Kenny*, 462 F 2d 1205 (CA3 1972), however, the federal courts accepted the government's submission that because of the disjunctive language of Sect. 1951(b)(2), allegations of force, violence or fear were not necessary. Only proof of the obtaining of property under claims of official right was necessary. Furthermore, every Court of Appeals to have construed the phrase held that if did

not require a showing that the public official "induced" the payor's consent by some affirmative act such as a demand or solicitation. Although there was some difference in the language of these holdings, the "color of official right" element required no more that proof of the payee's acceptance knowing that the payment was made for the purpose of influencing his official actions. In 1984, however, the Court of Appeals for the Second Circuit, en banc, held that some affirmative act of inducement by the official had to be shown to prove the Government's case. *United States v. O'Grady*, 742 F 2d 682 (1984). In 1988, the Ninth Circuit en banc, agreed with the Second Circuit, overruling a prior decision expressing the majority rule. *United States v. Aguon*, 851 F.2d 1158 (1988). Other courts have been unimpressed with the view expressed in *O'Grady and Aguon*. See: e.g., *United States v. Evans*, 910 F2d 790-797 (CA 11 1990) cert. pending No. 90-6105; *United States v. Spitler*, 800 F2d 1267, 1274 (CA 4 1986); *United States v. Paschall*, 772 F2d 71 (CA 4 1985).

The conflict on this issue is clear, but this case is not the occasion to resolve it . . . (Emphasis provided.)

There is conflict between the circuits on whether it is or not required that a showing that the public official affirmatively induced the payment to prove the government's case. If the affirmative act was to be shown, that was an element of the offense, then, being an element of the offense, the indictment could not have been amended to show affirmative inducement

by the evidence. The amending evidence to prove the affirmative act was then, an impermissible amendment to the indictment and the Supreme Court will have to settle the conflict between circuits to settle the issue.

In all probability, the Supreme Court will grant Certiorari, specially when it recognizes the pending issue in *McCormick*. (Supra) Rule 10 of the Supreme Court points out as one of the reasons to grant certiorari review is "when a United States Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter..."

The Supreme Court did not settle the conflict in *McCormick*, (Supra) but recognized it and stated that that case is not the occasion to resolve it. We think that the case at bar, will be an occasion to solve it, since the inducement was not specifically alleged and it was brought to the court through **variance**, (as an amendment to indictment) which was an error which we pointed out to the Court and was never decided, neither in the Opinion of the Court nor when denying the Motion for Rehearing.

Furthermore, the Supreme Court has granted Certiorari in *United States v. Evans*, Case No. 90-6105, 111 S.ct. 2256, 114 L.ed 2d 708 (June 3, 1991), which presents a similar issue for review, as the one presented herein.

At Trial, the prosecutor was faced with the predicament that the indictment did not contain the essential element of demand and tried to establish said demand by having Serrano testify that Boscio on "April or May had asked what is in it for me". (We objected to that as variance, since the indictment did not appraise defendant of what to confront at trial) That was an impermissible amendment to the indictment because that alleged statement was "out of the time frame" of the indictment and specific inducement was not alleged, either.

The Judge permitted the Variance.

The statement of "what is in it for me", is not demand or inducement, either. Even if that had been alleged in the indictment, that cannot constitute demand. To constitute inducement, the person asking for payment, had to demand it and had to tell the person making the payment that he would or would not act if not paid and that is absent from this case.

In Petitioner's case, it has been established that he was paid for the work as stated in the averment of fact. Serrano paid him because he had in his mind that he had "worked hard" for his money.

"Well, I am going to answer to that question in two parts, If I am allowed. In the case of Attorney Juan Luis Boscio, I paid him the money, because I understand that he **deserved it**, because he worked hard with me..."

Serrano did not pay Boscio because he felt menace, he paid him because he "deserved it" and that is what he had in his mind that moved him to make the payment.

It is important to bring to the attention of the Court, that Serrano was also indicted in this case. Justice Scalia in his concurring opinion in *McCormick* stated: (59 U.S.L.W. P.4480)

"Finally, where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime Bribery, *not extortion* and like all bribery laws I am aware of (but unlike Section 1951 and are the other extortion laws I am aware of, *it punishes not only the person receiving the payment but the person making it.*)"
(Emphasis provided.)

Thus, we can conclude that **the qrand jury indicted Serrano**, the person making the payment, and also Boscio and Tormos, **since they were confusing the law and determined a bribe was an extortion**.

The Fifth Amendment guarantees the defendant the right to be convicted of the offenses presented in an indictment **returned by a grand jury, and a substantive amendment to an indictment is** reversible error. An indictment is amended when the prosecution or the court alters the charging terms of an indictment, either literally or constructively, after the grand jury returns an indictment. See: *Stirone v. United States*, 361 U.S. 212, 217-19 (1960).

In *Stirone*, (Supra)the Court expressly stated: "Yet because of the courts admission of evidence and under its charge **this might** have been the basis upon which the trial jury convicted petitioner. If so, he was convicted on a charge the grand jury never made against him. This was fatal error. (Emphasis provided.)

POINT II

Can a conviction stand where Brady Materials have been intentionally withheld by the government, which did not permit complete full cross-examination of main witness, which in turn permitted perjured testimony and a false theory to stand uncorrected?

The Circuit Court upon deciding this issue stated that:

"due process violation occurs only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different" citing *United States v. Bagley*, 473 U.S. 667, 682, and that our approach (to Jenks Act) claims has been determined

whether the defendant has been prejudiced by the governments' (negligence) failure to disclose. Citing *U.S. v. Izzi*, 613 F.2d 1205, 1212 (lst Cir. (1980).

The Circuit Court stated that the heart of the prosecution was simply that Boscio had "obtained property from Serrano under color of official right, which pocket of Serrano it came from was not in itself an essential issue..." and assuming the jury believed the funds were paid for the corrupt purpose to which Serrano testified, *the precise source was of little consequence.*

Even assuming the Funds' source has some relevance, Boscio does not explain, or the later discovered evidence, prevented him at Trial from presenting aspects of his defense. *Nothing prevented Boscio from summonsing bank statements and other evidence* material to identify the sources of funds in the various accounts. Being familiar with *his own role as attorney* and his relationship with Serrano and the others, Boscio was well able himself to know what evidence he wanted and to go after it *before Trial.*"

The consequences of the non disclosure by the Government was very prejudicial for several reasons, especially permitting false evidence to stand uncorrected.

The Government prepared and submitted into evidence a Chart which was **Blown-up** to show how Boscio had collected from Municipal funds -through the $100,000 C.D. dated June 17, 1983- so as to link Petitioner with collecting Municipal funds and to hide any possibility that the Universal Tank Loan could have surfaced and that in no way the jury could have inferred that Boscio had collected from that transaction. The government emphatically denied haying had the "C.D.", which was not true, since the government had obtained all the records from the Bank. How could the government have prepared the Chart, if they never had the

Certificate of Deposit?

The Chart was false and Serrano's testimony was also false, and the government intentionally, let it stand uncorrected.

The Circuit Court saw no importance,on Boscio's source of funds and stated that the precise source was of little consequence, we respectfully disagree with First Circuit Court's conclusion for the following reasons:

Petitioner had diligently done all discovery efforts provided by the Rules and information was not handed to him.

The Court emphasizes Boscio's role as an attorney placing on him a higher burden of discovery that would be required from defendants that belong to other professions, which we believe is unfair and insidious to Due Process, since all accused of crime should be measured in an equal manner and awarded the same rights.

Serrano was not announced as a witness and Petitioner had no reason to expect that he would be brought as a **surprise witness**. Then, How could Boscio have summoned the information that was under government control when in the middle of Trial, the Prosecutor denied he had it? Does a defendant has to presume the government will hide evidence and do more efforts that the mechanism provided by the Rule of Discovery, anticipating fowl play from the government?

The Rule of conduct is that the government seeks to make justice and not to win cases at any cost. See: *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 Led 1314. (1935).

Every defendant that chooses to stand trial has faith that such a norm of conduct is the one governing criminal trials

because otherwise, it would be futile to go through all the hardships of trial knowing that the government would be at liberty to do anything to obtain a conviction. The limitations placed on the government is the difference between Totalitarianism and Democracy.

The failure to disclose was highly prejudicial to Petitioner's case for the following:

If the missing pages of Serrano's Account at the Bank and the Certificate of Deposit had been provided to Boscio, then Serrano would have been properly confronted with that evidence and he would have had to admit, that Boscio put the Universal Tank Loan together with him, traveled extensively, etc. for which he was paid.

The Chart prepared by the government would have been exposed as false and the "earmarked C.D. theory", by Serrano would have also, being exposed as false.

What would the jury had done, if it was proven that Serrano had lied and the government had presented a false theory as to Petitioner's sources of money?

The jurors knowing that Serrano had lied in all probability would not have given credibility to the rest of his testimony and a reasonable doubt would have generated in their minds as to Boscio's guilt.

Petitioner was entitled to the evidence withheld, and entitle to expose the falsity of the evidence and therefore, entitled to having being able to generate that reasonable doubt in the jurors. To have disabled his defense team from having done so, (by withholding evidence) was a reversible error that demands a New Trial, where Serrano, the main

witness for the prosecution, could be properly confronted to extract the truth, which is one of the main goals of a trial.

The First Circuit Court concluded that the heart of the prosecution was that Boscio had obtained property from Serrano, under color of official right. Which pocket of Serrano's the money came was not in itself an essential issue. But **veracity** and **reasonable doubt** was the issue.

Those incidents were not a of little consequence as the Court determined, but were of utmost importance and should have reached the jury, since it is the core of our criminal justice system, that a defendant has to be pronounced guilty beyond reasonable doubt

If the jury had seen the truth after proper confrontation of Miguel Serrano with the evidence withheld,wouldn't they have asked themselves:

Why would Boscio declare the bribe money in his Tax Returns and do the Universal Tank deal for nothing?

Once the jury had the true picture, then they could have reached the conclusion that Boscio declared the money received in his Tax Returns (Tax Returns were filed on April, 1984 before any investigation had begun) because he had nothing to hide, having received a legitimate payment for work performed. The withholding of evidence was indeed very prejudicial to Petitioner Boscio.

Due Process considerations requires a New Trial to be granted when the government either knew, or should have known that the evidence it used at trial, was false evidence; This requirement for a New Trial exists, even when the government did not solicit the false evidence, but only let it stand uncorrected. *Giglio v. United States*, 405 U S 150 Quoting *Napue v. Illinois* which is by itself authority for the

need to grant a new trial, when false evidence has been used to obtain a conviction. See also: *Alcorta v. Texas*,355 U.S. 28 (1957); *Miller v. Pape*, 386 U.S.1 (1967).

Thus, if reasonable doubt could have been generated and if disclosure of the evidence had occurred, then the evidence was material to guilt or innocence and the conviction should be reversed, as stated by the Supreme Court in *United States v Bagley*, 473 U.S. 667:

"*Impeachment evidence as well as exculpatory evidence* falls within the scope of the rule that the failure of the prosecutor to disclose evidence favorable to an accused violates due process where the evidence is material to guilt or innocence..." (Emphasis provided.)

The Certificate of Deposit, intentionally withheld by the government, was exculpatory because if it had been available, it would have permitted effective cross-examination of Serrano, and when presented in evidence, it would have exposed the government's theory as false and a reasonable doubt as stated above, would have been generated.

In *Brady v. Maryland*, 373 U.S. 83. 10 Led 2d 215, 83 S.Ct. 1194, the Supreme Court established:

"The suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The non disclosure of evidence violated Petitioner's due process rights for which the Court of Appeals should have reversed the conviction.

VI CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a writ of Certiorari should be granted

RESPECTFULLY SUBMITTED,

At Ponce, Puerto Rico, June 27, 1992.

JUAN LUIS BOSCIO
Pro-se